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A new approach to assessing state compliance with the obligation to devote maximum available resources to realise economic, social and cultural rights

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Abstract

According to Article 2(1) of the International Covenant for Economic, Social and Cultural Rights, states have an obligation to devote maximum available resources to the realisation of economic, social and cultural (ESC) rights. Most proposals for assessing compliance with this obligation involve the use of benchmarks. This paper proposes a different sort of approach, which involves assessing the likely consequences of the additional steps a state party could take, but is not currently taking, to further the realisation of ESC rights. If none of these consequences are sufficiently adverse, it can be claimed that a state party is not using maximum available resources to realise ESC rights. The conceptual basis for this type of approach was set out clearly, if only briefly, by Robertson (1994). Implementing the approach in practice requires the use of human rights impact assessment and budget analysis.

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1 Introduction

The aim of this paper is to set out a new type of approach to assessing state compliance with Article 2(1) of the International Covenant for Economic Social, and Cultural Rights (ICESCR): the obligation to use maximum available resources for realising economic, social and cultural (ESC) rights.[1] As has been well documented, monitoring compliance with this obligation is difficult and poses a number of challenges (e.g. Robertson 1994, Chapman 1996, Leckie 1998, Felner 2009). In particular, while we might be able to measure the level of realisation of an ESC right, and the increase in the realisation of a right over time, how are we to determine whether these represent what a state party is able to achieve, given its available resources?

One approach to overcoming this challenge is to use benchmarks. In this context, a benchmark is simply the level of an ESC rights indicator that a state party is considered able to achieve, given its available resources. By comparing the benchmark with the actual level of the indicator, it is possible to assess whether the state party is using its maximum available resources. One example of this sort of approach is the 'IBSA' procedure (which stands for indicators, benchmarks, scoping and assessment) set out by Hunt (1998) and Riedel (2002). In this approach, the benchmarks are levels of key ESC rights indicators considered achievable by the end of a five year period, and are determined through a process of dialogue between a state party and the UN Committee for Economic, Social and Cultural Rights (CESCR). If actual levels of the relevant indicators turn out to be below the benchmarks, and this is not considered to be the result of factors outside the state party's control, the state party may be criticised for not adequately complying with Article 2(1).

Another example of the use of benchmarks to assess compliance with Article 2(1) is the index of economic and social rights fulfilment set out by Fukuda-Parr et al (2009). Under this approach, the benchmarks are levels of key ESC rights indicators considered achievable at any one point in time, and are determined through the use of statistical analysis. If the actual levels of the relevant indicators are below the

[1] The precise obligation on each state party is "to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant" (Article 2(1), International Covenant on Economic, Social and Cultural Rights).

benchmarks, the implication is that the state party is not using its maximum available resources to realise ESC rights.[2] Cingranelli and Richards (2007) have proposed a similar approach, which also uses statistical analysis to calculate the levels of ESC rights indicators that a state party can be expected to achieve, given its available resources. The use of benchmarks is also emphasised by Hunt and MacNaughton (2007) and Backman et al (2009), and is part of the methodological tool-kit for monitoring progressive realisation outlined by Felner (2009).[3]

The use of benchmarks therefore offers one way of assessing a state party's compliance with Article 2(1). However, it is possible to assess compliance with Article 2(1) without the use of benchmarks. To illustrate, consider the following example. Recent estimates suggest that around 60 percent of children of secondary school age in Ecuador attend secondary school (World Bank 2010). Is the government of Ecuador using maximum available resources to realise the right to secondary education? One way to address this question would be to calculate a benchmark, i.e. one could seek to determine what level of secondary school enrolment is achievable in Ecuador. If this level is above the actual enrolment rate (60 percent), we could conclude that the government is not using maximum available resources to realise the right to secondary education. However, another way to proceed is simply to ask whether a higher rate of secondary school enrolment than 60 percent is achievable in Ecuador. If it is achievable, we could again conclude that the government is not using maximum available resources to realise the right to secondary education. But we could do this without having to calculate a benchmark.[4]

[2] Fakuda-Parr et al (2009) in fact set out two approaches to calculating their economic and social rights fulfilment index; the discussion here refers to the second approach, which is based on the construction of an 'achievement possibilities frontier'. It is also worth noting that their index does more than simply assess whether a state party is complying with Article 2(1); it also measures the extent of compliance, and is able to provide a ranking of state parties on this basis (see also Randolph et al 2009).

[3] Hunt and MacNaughton (2007: 308) argue that the "most appropriate device" for monitoring progressive realisation is "the combined application of indicators and benchmarks". Backman et al (2009: 28) argue that "[w]ithout indicators [and] benchmarks … it is not possible to monitor the progressive realisation of the right to health". Felner (2009:417) argues that in judging the performance of a state party in raising the realisation of ESC rights over time, the performance of other similar countries can provide "an objective benchmark".

[4] Here one could debate whether the secondary school enrolment rate is a good indicator of the level of realisation of the right to secondary education; however, this is not the point of the example. The same point would apply if we were to consider any other possible indicator of the level of realisation of this right.

In asking whether a higher level of realisation in an ESC right is achievable, we must first consider what additional steps a state party could take, but is not currently taking, to bring this about. However, we must also ask whether taking these steps would have other consequences which are sufficiently adverse to justify not taking the steps. Thus the question relates to what is achievable in a normative sense, not in a purely technical sense. But if we do conclude that a higher level of realisation in an ESC right is achievable, in this normative sense, it follows that a state party is not doing as well as it could be; it is, in other words, not using its maximum available resources to realise ESC rights. In this way, it is possible to assess compliance with Article 2(1) by considering the likely impacts (or consequences) of the additional steps a state party could take, but is not currently taking, to further the realisation of ESC rights.

Clearly there are challenges to be faced in applying this sort of approach to assessing compliance with Article 2(1). On the one hand, assessing the likely impacts of actions which have not yet been taken involves a number of methodological challenges. On the other hand, there is the difficult normative question of what consequences are sufficiently adverse to justify not taking a step which would promote the realisation of an ESC right. However, this normative question is difficult to avoid, whatever approach we use, and it is an advantage if our answers are made explicit and subject to scrutiny. In addition, methodological challenges are also faced in the use of benchmarks: in particular, there is no easy way to determine what level of an ESC rights indicator a state party is able to achieve, as opposed to what it is actually achieving.[5] For these reasons, the approach to assessing compliance with Article 2(1) outlined in this paper is worth considering.

The remainder of the paper proceeds as follows. Section 2 sets out the conceptual basis for the approach outlined in this paper, which draws on but extends the discussion in Robertson (1994). Section 3 then discusses two methods which are

[5] The methodological challenges associated with the IBSA approach are discussed by Osmani (2000) and Felner (2009). On the one hand, it is not clear how the CESCR would assess whether the benchmarks set by each state party are sufficiently ambitious. Arguably, state parties would have an incentive to set low benchmarks – so as to avoid censure by the CESCR – when their available resources would in fact permit much higher benchmarks. On the other hand, it is not clear how the CESCR would assess whether the actual progress made over a given five year period was satisfactory. A state party may claim, for example, that adverse external factors (e.g. a collapse in the price of a key export commodity) meant that the original benchmark were no longer feasible. This, however, could simply be used as an excuse.

already being used in the human rights field and which are highly relevant to the approach: human rights impact assessment and budget analysis. Section 4 then discusses how the approach can help overcome some of the challenges facing international human rights organisations in monitoring and defending ESC rights. Section 5 concludes.

2 Conceptual framework

In an important paper, Robertson (1994) asks four questions in relation to the obligation on state parties to devote maximum available resources to realising ESC rights. These are: a) what is a resource; b) what resources are potentially available to the state; c) what resources must be made available by the state; and d) how can state compliance with the resource allocation obligation be measured. The third of these questions, viewed by Robertson as "one of the most difficult in the human rights field" (ibid: 701), is particularly relevant to the approach set out in this paper, and his answer is worth repeating.[6]

Robertson's answer to his third question is that a resource which is potentially available for realising an ESC right must be made available by the state, as long as doing so would not adversely affect any other right. The justification is that human rights take priority over all other competing concerns. In particular:

> "[b]ecause human rights necessarily claim priority over all other considerations, governments must, at least in theory, marshall all the resources needed for their satisfaction, up to the point where this would infringe upon the satisfaction of other human rights." (ibid. 700)

He gives the following example to illustrate. Consider a place where some people are homeless, and where a church building is being used as a place of worship. From the

[6] Robertson's answer to his first question is that resources are simply "that upon which the satisfaction of [ESC] rights is dependent" (ibid: 695). For example, school buildings, teachers and textbooks are all resources in that they are necessary for people to enjoy their right to education. He goes on to define five types of resources which are most important in terms of achieving ESC rights, namely financial resources, natural resources, human resources, technology, and information. His answer to his second question is that all of the domestic resources of the country are potentially available to the state for realising ESC rights. A certain amount of international resources will also be potentially available to the state, in the form of international aid and technical assistance, although this may not be equal to what the state currently receives in aid and technical assistance.

perspective of the right to shelter, the church building is a potentially available resource, since it could be used to provide shelter for those who currently lack shelter. However, if the state was to appropriate the church building for this purpose, this would constitute an infringement of the right to freedom of religion. In this case therefore, making a resource available to promote one right would involve an infringement of another right. For this reason, there would be no obligation on the state under Article 2(1) to appropriate the church building for the purpose of promoting the right to shelter.[7]

The key point is that to assess whether a state party is required to make a resource available for promoting an ESC right, we must consider the consequences of withdrawing it from its current use. If any of these consequences is sufficiently adverse – according to Robertson, if there is an infringement of another human right – then there is no obligation to make the resource available. However, if none of the consequences are sufficiently adverse, then by implication there is an obligation to make the resource available. A very similar point was made by Eleanor Roosevelt during the drafting process of the ICESCR. She argued that:

> " … it should be clear that a State was not required to use all its resources without exception but only the maximum which could be expended for a particular purpose without sacrificing essential services" (E. Roosevelt, cited in Alston and Quinn 1987: 178).

Again, the argument is that to assess whether a state party is obliged to use a resource for the purpose of realising ESC rights, we must consider what consequences would follow as a result of withdrawing it from its current use. If any of these consequences is sufficiently adverse – according to Roosevelt, if there is a sacrifice of essential services – then there is no obligation. But if none of the consequences are sufficiently adverse, there is an obligation. There is no record of what Eleanor Roosevelt meant by essential services, but if we interpret this phrase to mean services which are essential for the protection or promotion of human rights, then the point is essentially the same as that made by Robertson.

[7] In fact, Robertson (1994) goes further and argues that it would not be legitimate for the state to appropriate the church building for the purpose of promoting the right to shelter. For the purposes of this paper however, the key point is simply that the state would not be obliged to appropriate the church building for this purpose.

This line of reasoning also helps explain the distinction made by Robertson regarding the use of domestic as opposed to international resources. He argues that while all available domestic resources must be considered for use by the state, all available international resources must in fact be obtained (ibid: 700). The obligation is to consider the use of domestic resources for promoting ESC rights, and not necessarily to use them for this purpose, since the latter could infringe on another right and would not therefore be obligatory (as in the church building example). The obligation is to obtain international resources, and not simply to consider obtaining them, since the former arguably could not infringe on any other right: the burden is in this case met by other countries.[8]

Although not explicitly recognised as such, the arguments made by Robertson and Roosevelt provide the conceptual basis for an approach to assessing compliance with the obligation to devote maximum available resources for realising ESC rights. This approach can be conceptualised in three main stages. The first stage involves identifying a step that a state party could take, but is not currently taking, which would further the level of realisation of at least one ESC right for at least some people. By the level of realisation of a right, we mean the extent to which rights-holders – in this case, individuals – have the object of that right.[9] The step need not raise the level of realisation of an ESC right for all individuals, nor result in the full realisation of an ESC right; however, it should raise the level of realisation of at least one ESC right for at least some individuals.

The second stage involves asking what resources are required for the step identified in the first stage to be effective, and how these resources are to be made available. Although there may be some steps which do not require the use of resources, the more usual case is that they will: "simply taking a step may be meaningless without an accompanying resource being provided" (Robertson 1994: 695). Typically, various different resources will be required for any one step; for example, a school building

[8] The argument that obtaining international resources could not infringe on any other right is not made explicit by Robertson, but it does appear implicit in his argument that all international resources *must* be obtained. In addition, Robertson does not say that all international resources must be *used* for the purpose of realising ESC rights, only that they must be *obtained*. The reason, which again is not made explicit but appears implicit, is that it would be legitimate if international resources were used to promote civil and political rights rather than ESC rights.

[9] This is also referred to the level of enjoyment of a right (e.g. Raworth 2001, Donnelly 2003, Sengupta 2004). In the remainder of this paper, the terms enjoyment and realisation are used interchangeably; no distinction is made between them.

programme will require a certain amount of labour for construction, building materials, and land. Some of these resources (e.g. land) may be owned by the state party, but at least some are likely to be privately owned. In the latter case, the state party must mobilise the resources in some way, and one of the most common ways of mobilising private resources is to pay a monetary price for their use. This in turn requires that the state party be able to raise revenue, in order to finance the necessary expenditure. [10]

The third stage involves asking whether taking the step identified in the first stage, and mobilising the necessary resources, would have any consequences are sufficiently adverse to justify not taking the step. Robertson (1994) argued that a sufficiently adverse consequence would be an infringement of another human right. One type of infringement occurs when a step directly violates a human right: for example, if it involves the use of forced labour, or discriminates on the basis of race or gender.[11] However, an infringement would also occur if, despite raising the level of realisation of an ESC right for some individuals, a step also causes a reduction or 'retrogression' in the level of realisation of another right for some individuals. For example, a school building programme might raise enjoyment of the right to education, but it could also cause a retrogression in the right to an adequate standard of living for people on low incomes, if the step is financed by a steep rise in indirect taxation. Both of these types of infringement would, in the context of Article 2(1), represent a sufficiently adverse consequence for not taking a step which would raise the level of realisation of an ESC right for at least some people.[12] [13]

[10] It may be possible for a state party to mobilise private resources in ways other than paying a monetary price for their use. For example, a state party may be able to persuade local communities to provide the labour needed for a school construction programme voluntarily, rather than having to pay for construction labour. However, although this may reduce the amount that the state party must spend in order to mobilise private resources, it is unlikely to eliminate the need for expenditure altogether.

[11] That steps to promote the realisation of ESC rights must not be discriminatory is made clear by Klerk (1987: 262); he quotes the 1962 report of the Third Committee of the UN General Assembly, which stated that although "the realisation of the rights proclaimed in the Covenant must of necessity be progressive, it should be equally clear that there must be no discrimination during the process of progressive implementation of those rights".

[12] Note that both types of infringements can be described as consequences of a step taken by a state party, as long as consequences are defined sufficiently broadly to include the nature of steps (or actions) carried out, and not simply what actually happens as a result of those steps (see Sen 2000: 487-488; 2009: 215-219).

Two further issues require consideration in this third stage. First, Article 4 of the ICESCR can be interpreted to imply that a state party can limit the realisation of ESC rights if doing so would promote the general welfare.[14] If this interpretation of Article 4 is accepted, a reduction in the general welfare would be another sufficiently adverse consequence for not taking a step which would raise the realisation of an ESC right for at least some people.[15] Second, the minimum core obligations on state parties, as set out by the CESCR in General Comment No.3, have been interpreted to imply that meeting core entitlements (e.g. the rights to essential foodstuffs and essential primary health care) must take priority over any other objectives a state party may have.[16] If this interpretation of the minimum core obligations is accepted, it follows that the only consequence sufficiently adverse to justify not taking a step to further the realisation of a core entitlement would be an infringement of another core entitlement.[17]

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[13] Note also that it is not implied here that a state party is prohibited from taking a step which causes an infringement of a human right for at least some people; this is a separate issue. The focus here is on the possible grounds for not taking a step which would promote the realisation of an ESC right for at least some people.

[14] The precise wording of Article 4 of the ICESCR, the so-called 'general limitations clause', is as follows: "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

[15] The concept of the general welfare is of course potentially a very broad one. According to Alston and Quinn (1987: 202) however, an "expansive" interpretation of this term would not be appropriate, since the aim of the drafters of the ICESCR was to ensure that "limitations [on the enjoyment of ESC rights] could not lightly be justified". Thus objectives such as 'national defence' or 'economic development' could only limit the enjoyment of ESC rights if they were "genuinely synonymous" with the general welfare (ibid). Furthermore, a state party's definition of what constitutes the general welfare would be subject for international review.

[16] The relevant section of General Comment No.3, which refers to the priority status of core entitlements, is as follows: "… the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, *as a matter of priority*, those minimum obligations." (General Comment No.3, para 10; italics added). Young (2008) refers to the association of the core aspects of a right with the notion of priority as the 'essence approach' to the concept of minimum core obligations; she contrasts this with the 'consensus approach' and the 'obligations approach'.

[17] This assumes that the term 'priority' is interpreted in a lexicographic sense; in other words, one objective A is considered higher priority than another objective B, in the sense that an improvement in B could never outweigh a deterioration in A.

There is therefore scope for further discussion regarding the question of what consequences are sufficiently adverse to justify not taking a step which would raise the realisation of an ESC right for at least some people. The key point, however, is that the set of such consequences is not without limit. As documented by Alston and Quinn (1987: 202), discussions during the drafting of the ICESCR focused on "the need to reduce the range of justifications that could be invoked for imposing limitations" on ESC rights; delegates recognised that unless the range of justifications was narrowed, obligations on state parties would 'evaporate'.[18] Article 4 was therefore included in the ICESCR as a way of protecting ESC rights, by "limiting both the purposes for which limitations may be imposed and the manner in which that may legitimately be done" (ibid: 193). Clearly, a state party cannot invoke any adverse consequence as grounds for inaction.[19]

As a result, it is possible to come to an overall assessment about a state party's compliance with Article 2(1). If there are *no* steps a state party could take which would raise the realisation of at least one ESC right, without having sufficiently adverse consequences, then the state party *is* complying with Article 2(1). However, if there is *at least one* step a state party could take which would raise the realisation of at least one ESC right, without having sufficiently adverse consequences, and the state party is not taking one of these steps, then the state party is *not* complying with Article 2(1).

Two points about this overall assessment are worth making. First, there may be several steps a state party could take, all of which would further the realisation of at least one ESC right without having sufficiently adverse consequences. For example, if a state party has access to (but is not currently obtaining) international assistance, it could use that assistance to finance various different steps (e.g. a school building programme, employment creation schemes, subsidised medical treatment). In such a

[18] For example, the representative for Chile argued that "unless the limitations [on ESC rights] … were rigorously circumscribed, the obligations of States would evaporate" (Santa Cruz, cited in Alston and Quinn 1987: 197).

[19] In this context, Osmani (2000: 292-293) argues that any course of action decided by a state party could be justified, as long as the decision results from a participatory decision making process. This would imply that it is not possible to say what constitutes a sufficiently adverse consequence for not taking step to promote an ESC right; this is a judgement for the people of each society to decide, in a participatory way. Arguably however, this position is not consistent with Article 4 of the ICESCR, which is designed to narrow the range of possible justifications which could be made for limiting the enjoyment of ESC rights, and not simply to require that any justification be the result of a participatory decision making process.

case, a human rights monitoring organisation cannot advocate that the state party takes any one particular step. However, it can claim that a state party which does not take any of the steps is not complying with its obligation to use maximum available resources. The approach outlined above is therefore an exercise in assessing compliance with Article 2(1), not in advocating particular policy measures.[20]

Second, it is much more difficult to show that a state party is complying with its obligation to use maximum available resources than it is to show that a state party is not complying. To show that a state party is not complying, a monitoring organisation needs only to identify one step that a state party could take, but is not currently taking, which would raise the realisation of at least one ESC right without having sufficiently adverse consequences. To show that a state party is complying, a monitoring organisation would need to show that all of the additional steps a state party could take which would raise the realisation of at least one ESC right would have sufficiently adverse consequences. Clearly the latter is a much more difficult exercise. For practical reasons therefore, the approach outlined above is best considered as a way of demonstrating that a state party is not complying with Article 2(1). If there is no evidence to demonstrating a lack of compliance, it may make more sense to simply presume that a state party is complying.

3 Relevant methods

Section 2 outlines an approach to assessing state compliance with Article 2(1) of the ICESCR which does not require the use of benchmarks. The aim of this section is to illustrate the sorts of methods which are relevant when seeking to apply this approach in practice.[21] The two sorts of methods which are most relevant are human rights impact assessment and budget analysis.

[20] The only exception would occur if there is only one additional step a state party could take which would promote the realisation of ESC rights without having sufficiently adverse consequences. In this case, a monitoring organisation could claim that by not taking this step the state party is failing to comply with Article 2(1), and also that this step must be taken.

[21] I have discussed some of these methods in earlier work, namely Anderson (2008) and Anderson and Foresti (2009). The following section draws on some of the material contained in these earlier papers.

3.1 Human rights impact assessment

Human rights impact assessment has been defined as a "process of predicting the potential consequences of a proposed policy, programme or project on the enjoyment of human rights" (Hunt and MacNaughton 2006: 4). This definition applies most clearly to *ex ante* human rights impact assessments, which are carried out before a policy or project is implemented. However, human rights impact assessments can also be *ex-post*, i.e. carried out after implementation; in this case, they can be defined as a process of assessing the actual consequences of policies, programmes or projects. Human rights impact assessment can be applied to policies and projects specifically designed to promote human rights, as well as to policies and projects not specifically designed for that purpose, but which might nevertheless have an impact on human rights (Landman 2006; de Beco 2009).

Human rights impact assessments are highly relevant to the approach to assessing compliance with Article 2(1) set out in Section 2. As already discussed, this approach requires us to identify a step which would have a beneficial impact on at least one ESC right, and also to consider whether this step would have an adverse impact on any other right. In each case, the type of analysis involved is *ex ante* human rights impact assessment: predicting the likely impacts of a step that a state party has not yet taken on the enjoyment of human rights.

One difference is that *ex-ante* human rights impact assessments are normally considered in relation to steps that a state party *is* proposing to take. The aim is to identify in advance potentially adverse impacts on human rights; if necessary, the step can be re-designed in order to mitigate or avoid any adverse impacts of this sort.[22] By contrast, the approach set out in Section 2 requires us to consider the potential impacts of steps that a state party *is not* proposing to take, on the grounds of a perceived lack of resources. Despite this difference however, the nature of the exercise remains the same: that of predicting the likely impacts on the enjoyment of human rights of policies or projects that a state party has not yet taken.

Another difference is that human rights impact assessments are sometimes seen as best focusing on certain rights; for practical reasons, they "cannot be all things to all

[22] For example, the CESCR has argued that state parties should carry out a human rights impact assessment whenever they propose an important piece of legislation, or an important policy initiative (E/C.12/1/Add.19, para. 35).

rights" (Gay 2008: 40; see also Hunt and McNaughton 2006: 26). By contrast, the approach set out in Section 2 requires that we do consider the impacts on all human rights, since an adverse impact on any one right would be a sufficiently adverse consequence for not taking a step. This of course raises the practical challenge of carrying out a human rights impact assessment, but it does not alter the nature of the exercise.

In carrying out an *ex ante* human rights impact assessment, various methods and techniques may be used. One obvious starting point is to identify the factors which currently affect the enjoyment of ESC rights. For example, in many countries the distance that children have to travel to their nearest school is recognised to be one factor which affects their enjoyment of their right to education. This is evidenced, at least in part, by the close statistical correlation which often exists between children's enrolment in school and the distance they have to travel to school, even when controlling for various other factors which affect enrolment (e.g. Filmer 2007). Given this evidence, it would be reasonable to conclude that building new schools in areas in which distances to school are currently very high (e.g. rural areas) would have a beneficial impact on at least some children's enjoyment of their right to education.[23]

To give another example, the level of tuition fees is recognised to be one factor which affects many young people's enjoyment of their right to higher education. This is evidenced, again at least in part, by the close statistical correlation which often exists between college enrolment rates and the level of tuition fees, again even when controlling for other determinants of enrolment (e.g. Leslie and Brinkman 1987, Heller 1997). Given this evidence, it would be reasonable to conclude that a policy of raising tuition fees for college education would have an adverse impact on at least some young people's enjoyment of this right, particularly those from low-income families who are constrained in their access to credit.

There are of course various ways of identifying the factors that affect the enjoyment of a particular right; statistical analysis (as in the previous examples) represents only one option. Qualitative analysis may also be used, and is particularly important if the major constraints to higher levels of enjoyment of an ESC right are difficult to

[23] The extent of the correlation between enrolment in school and distance to school is often much more marked for girls than for boys, most likely because of the added threats to girls' security when travelling to and from school (e.g. UNESCO 2010). Thus building more schools in areas in which distances are currently very high would also be likely to have a particularly beneficial impact on the enjoyment of the right to education among girls.

measure and unlikely to be accurately reflected in survey data. In considering what factors constrain school enrolment for example, the daily experience of parents, teachers and public sector officials can identify factors such as curriculum design, or parental attitudes, or teacher absenteeism, which although difficult to measure are nonetheless significant in terms of limiting enjoyment of the right to education. Given the likely uncertainty and potential for bias from survey analysis, it can also be very important to combine qualitative and quantitative evidence as a way of cross-checking conclusions.[24]

One of the biggest challenges in carrying out an *ex ante* human rights impact assessment concerns the issue of financing. As discussed in Section 2, most steps designed to raise the enjoyment of ESC rights (e.g. a school building programme) are likely to require that the state party incurs expenditure, in order to mobilise privately owned resources. This in turn requires that the state party raises revenue, and depending on precisely how the revenue is raised, this could result in an infringement of human rights. To consider the impacts of steps which have expenditure and revenue implications, we must combine human rights impact assessment with the use of budget analysis.

3.2 Budget analysis

In recent years there has been increasing interest within the human rights field in budget analysis (e.g. Fundar-IBP-IHRP 2004; APRODEV, 2007). Two types of budget analysis are particularly relevant to the approach for assessing compliance with Article 2(1) set out in Section 2. The first is costing policy proposals, and the second is identifying potential sources of revenue.

Costing studies ranges from back-of-the-envelope calculations to those based on more detailed and comprehensive study. An example of the former type is provided

[24] Analysis of survey data can be misleading, for various reasons. One common problem is that some of the factors known to affect a particular outcome (e.g. school enrolment) cannot be included in the analysis for reasons of data availability. For example, it might be that parents living far from school do not consider the school curriculum to be appropriate, but if the curriculum was different, they would send their children to school (despite the distance). Methods for dealing with this and other potential sources of bias in survey data analysis should therefore be used whenever possible. Randomised evaluations and control trials offer a further option for dealing with the potential biases of survey data. In the field of education for example, randomised evaluations have been used by governments, aid agencies and NGOs to explore the impact on school attendance of conditional cash transfers, free school meals, and free textbooks and materials (e.g. Glewwe 2002; Kremer 2003).

by Glewwe and Zhao (2005), who estimate that a conditional cash transfer programme in Nicaragua targeting 150,000 children would cost about US$20 million per year. This figure is based on an estimated transfer of around US$112 per child per year, and an estimate that administration costs would amount to between 10 and 20 percent of the total cost. An example of the latter type is provided by Kombe and Smith (2003), who estimate that providing free antiretroviral treatment to around 10,000 people living with HIV/AIDS in Zambia would cost around US$4.9 million per year, or US$490 per person treated. This estimate was obtained using information from various sources, including consultation with experts (for training needs) and official sources (for drug and test-kit prices).

Certain points of clarification are worth noting about the use of costing analysis for the purpose of assessing compliance with Article 2(1). The aim is to calculate the amount that the government must spend in order to mobilise the resources which are required for a step to be effective: i.e., to further the realisation of at least one ESC right for at least some people. This amount can be thought of as the financial cost of the step to the state. This cost will be lower if citizens provide some of the resources voluntarily. For example, if community members volunteer the labour required for the construction of new school buildings, the financial cost of a school building programme to the state will be lower. The financial cost to the state will also be lower if citizens contribute to financial costs by paying user-fees. In this case however, it must be recognised that user-fees may well limit the impact of a step on the enjoyment of ESC rights. For example, tuition fees may reduce the impact of a school-building programme on children's enjoyment of their right to education: increased physical accessibility would be offset by low economic accessibility.

It is possible that the financial cost of a step to the state will be zero, or even negative, if the step leads to savings in other areas. For example, the financial cost to the state of investing in clean water infrastructure might be offset entirely by savings in the amount the state party must spend each year on treating illnesses related to poor water quality. However, if there is a financial cost to the state, we must ask whether the state party can raise the revenue required to meet the financial cost, without having sufficiently adverse consequences. The obvious starting point here is to consider the four main sources of revenue available to a state party, namely the re-allocation of existing expenditure, taxation, borrowing, and international assistance.

The ability of a state party to raise the necessary revenue from each source can then be examined in turn.

In terms of the re-allocation of expenditure, the key question is whether any existing areas of expenditure can be reduced by the required amount without adversely affecting the enjoyment of any one human right. Possible examples would be defence or internal policing, if existing levels of expenditure in these areas are already very high. On the taxation side, the key question is whether any existing tax rate can be raised in a way which raises the required amount of revenue, but does not adversely affect the enjoyment of any one human right. A possible example would be a rise in import duties on imported luxury items, which would be likely to raise at least some additional revenue (even if imports of such items were to fall as a result), and arguably would not adversely affect the enjoyment of any one human right. Other types of tax increases could have adverse impacts on human rights however; for example, if higher taxes led to lower business investment and economic growth, this could in turn imply fewer employment opportunities and a reduction in the enjoyment of the right to work, for at least some people.

With regard to borrowing, the issues are somewhat different. In this case, part of the burden is transferred to future generations, who must service and eventually re-pay debts incurred by the current generation. There is a strong case for borrowing to finance capital expenditure (e.g. investment in transport infrastructure, school buildings, hospitals), since the benefits of such expenditure are received by future, as well as current, generations. However, even if borrowing is used to finance capital expenditure, there is a limit to the amount that a state party can borrow without jeopardising human rights. The reason is that high levels of borrowing can leave a state party vulnerable to a debt crisis, which would be likely to undermine its ability to protect and promote a whole range of human rights.

With regard to international aid, it can be argued that the use of such finance (if available) could not infringe on any human right, since the burden in this case is met by citizens in other countries. However, some aid is provided with policy conditions attached (e.g. privatisation of public services) and if implemented these policies could adversely affect the enjoyment of rights for some groups of people. There are also macroeconomic issues to consider: for example, very large inflows of foreign aid can cause the exchange rate to appreciate, with potentially adverse consequences for economic growth (IMF 2005).

Raising additional revenue through any of the four main sources therefore has at least the potential to adversely impact on the enjoyment of at least some human rights. How are we to establish whether or not this potential is real? One possible approach is to make use of threshold values of key macroeconomic indicators. For example, Heller (2006: 75) argues that any country is able to raise at least 15 percent of GDP in domestic taxation without jeopardising fiscal or macroeconomic stability; similarly, the UNDP has argued that any country can spend at least five percent of GDP on so-called 'human priorities' (e.g. basic health, education and access to water), without sacrificing private investment or economic growth (UNDP 1991: 40).[25] Public finance specialists have also suggested certain levels of public debt below which adverse consequences for economic growth are unlikely; a widely quoted figure, based on research by Rogoff and Reinhardt (2009), is 90 percent of a country's GDP. Similarly, aid specialists have suggested a certain threshold level of foreign aid receipts, below which adverse consequences for economic growth are unlikely.[26] If the actual levels of the relevant macroeconomic indicators are significantly below these thresholds, it is possible to argue that a state party is able to incur additional expenditure without sacrificing economic growth or macroeconomic stability.

The other way to proceed is to carry out *ex ante* human rights impact assessments of specific revenue raising measures, on a case-by-case basis. This requires that we first consider the channels through which a revenue raising measure could impact on the enjoyment of human rights. For example, consider the question of whether a state party could raise revenue for the further realisation of ESC rights by reducing defence expenditure. In this case, one could argue that a reduction in defence expenditure would lower economic growth, which would in turn have adverse implications for the enjoyment of the rights to work and an adequate standard of living. At first sight, this would provide a justification for not raising revenue in this way. . However, if the reduction in defence expenditure was used to finance (say) a rural health programme, the overall effect on economic growth may well be positive, on the grounds that better health contributes more to economic growth than defence

[25] The suggested option is to achieve this 5 percent benchmark by setting overall government spending at around 25 percent of GDP, and then to allocate 40 percent of overall spending to social spending, and 50 percent of social spending to human priorities (UNDP 1991: 40).

[26] A selection of such estimates are presented and discussed by Anderson and Waddington (2008); most lie between 10 and 30 percent of a recipient country's GDP.

expenditure.[27] In this way, justifications for not raising additional revenue which seem plausible at first sight might, on closer scrutiny, be rejected.

3.3 Other

As discussed in Section 2, a reduction in the general welfare may also be considered a sufficiently adverse consequence to justify not taking a step to promote the realisation of an ESC right. If this is the case, then it is also necessary to assess the impact of the additional steps a state party could be taking on the general welfare. The reason is that we must be able to show that there is at least one additional step a state party could take which would promote the realisation of at least one ESC right, without adversely affecting the general welfare. Fortunately, economists have developed a whole range of tools and methods for carrying out *ex ante* assessments of the impact of government policies on the general welfare, and efforts to assess compliance with Article 2(1) can draw on these tools and methods. Moreover, economists regularly recommend re-allocations of government expenditure, and increases in taxes, to finance new areas of expenditure, on the grounds that the overall impact on the general welfare is beneficial. It certainly should not therefore be presumed that steps to raise the realisation of ESC rights are in any way likely to reduce the general welfare.

4 Links to advocacy

In a recent article, Roth (2004) discusses some of the challenges facing international human rights organisations in monitoring and defending ESC rights. This section briefly illustrates how the type of approach outlined in this paper can help overcome some of these challenges, and as a result be worth considering for use by international human rights organisations.

The first challenge discussed by Roth relates to the legitimacy of international human rights organisations in challenging the resource allocation decisions made by a state party. He argues that:

> "[i]n an imperfect world in which the fulfilment of one ESC right is often at the expense of another … [the] voice [of international human rights organisations] insisting on a particular trade-off has less legitimacy than that of the country's residents. Why should outsiders be listened to when

[27] Assessments of this sort are described in more detail in Anderson (2008: 14, 40).

> they counsel, for example, that less be spent on health care and more on education … ?" (ibid: 65).

Because of their limited legitimacy, Roth argues that "merely advocating greater respect for ESC rights – simply adding our voice to that of many others demanding a particular allocation of resources – is not a terribly effective role for international human rights groups" (ibid).

The issue of legitimacy is certainly an important one. However, it is dealt with very clearly in the approach outlined in this paper. If it is the case that the greater fulfilment of one ESC right is necessarily at the expense of another, the implication is that a state party is using its maximum available resources to realise ESC rights. In such a case, there would be no legitimate basis, at least as far as Article 2(1) is concerned, for an international human rights organisation to challenge the way in which a state party allocates resources. The crucial question, however, is whether greater fulfilment of one ESC right is necessarily at the expense of another; this is what the approach outlined in this paper seeks to establish. If greater realisation of one ESC right need not come at the expense of another right (or, if considered relevant, the general welfare), then the implication is that a state party is not using maximum available resources to realise ESC rights. There would therefore be a legitimate basis for an international human rights organisation to challenge the way in which resources are allocated.

In the past, international human rights organisations have addressed the legitimacy challenge by seeking to show that there are things a state party could be doing to further ESC rights, which do not involve a significant resource cost. In the words of Roth:

> "… my experience has been that international human rights organizations implicitly recognize [the] tradeoffs [that can arise in the realm of ESC rights] by avoiding making recommendations which are costly. For example, Human Rights Watch in its work on prison conditions routinely avoids recommending large infrastructure investments. Instead, we focus on improvements in the treatment of prisoners that would involve relatively inexpensive policy changes." (ibid: 65)

A similar point has been made more recently by Felner (2009). He argues that the "primary focus" of ESC rights monitoring, not just of international NGOs but also UN Treaty Bodies and court adjudications, has been on the "various immediate obligations related to [ESC] rights which are not dependent on resource availability" (ibid: 403).

The advantage of this strategy is clear: if a policy which would protect or promote ESC rights does not have a resource costs, then it is possible to advocate very strongly that the policy should be adopted. Since no resources are required, no adverse consequences could arise which would justify not adopting the policy. There is a danger with type of strategy however. In particular, it is not able to detect instances in which the additional steps a state party could take to further the realisation of ESC rights are somewhat costly (i.e., they do require the use of resources), but are nonetheless perfectly affordable (i.e., the resources can be made available without sufficiently adverse consequences). This paper suggests the way to avoid this danger: that international human rights organisations also consider policies which require the use of resources, and use a combination of human rights impact assessment and budget analysis to assess the likely consequences of mobilising these resources. It is then possible to judge whether any of these consequences are sufficiently adverse.

This is not to claim that the only way for international human rights organisations to monitor state compliance with Article 2(1) is to carry out detailed human rights impact assessments and sophisticated forms of budget analysis; there are other options available. One such option is to use benchmarks, as discussed in Section 1. Another is to make use of thresholds for key macroeconomic indicators, as discussed in Section 3. Another possibility is to simply identify the factors which currently restrict the enjoyment of ESC rights in a particular country or region, as a way of highlighting the steps a state party could take to promote the realisation of ESC rights. The burden of establishing that these steps are unaffordable (i.e., that each would have sufficiently adverse consequences) might then be placed onto the state party. These different options can all be considered part of an overall 'tool-kit' for monitoring compliance with Article 2(1), in the way proposed recently by Felner (2009).

The other challenge for international human rights organisations discussed by Roth (2004) is that, in order to be effective in ESC rights monitoring, they must be able to

"hold official conduct up to scrutiny and to generate public outrage" (ibid.: 67); in other words, to 'name and shame'. In order to do this, they must in turn be able to:

> "show persuasively that a particular state of affairs amounts to a violation of human rights standards, that a particular violator is principally or significantly responsible, and that a widely accepted remedy for the violation exists" (ibid: 68).

The approach outlined in this paper arguably does provide a way to 'name and shame' a state party in this way. In particular, we can claim that a violation has occurred if we can show that there is a step that a state party could take which would further the enjoyment of an ESC right, and would not adversely affect any other right (or, if considered relevant, the general welfare), but this step is not being taken. The violator is the state party, and an acceptable remedy would be that the state party takes the step.

5 Conclusion

Most existing approaches to assessing compliance with Article 2(1) of the ICESCR involve the use of benchmarks. A benchmark is designed to reflect the level of an ESC rights indicator that a state party is capable of achieving; if the actual level or rate of progress is below the benchmark, it is possible to argue that a state party is not using its maximum available resources to realise ESC rights. This paper outlines a different type of approach, which involves assessing the likely impacts (or consequences) of the additional steps a state party could take to further the realisation of ESC rights, but is not currently taking. If one additional step can be identified which would promote the realisation of at least one ESC right for at least some people, without having sufficiently adverse consequences, then it follows that a state party is not using its maximum available resources to realise ESC rights.

It is not claimed here that this type of approach for assessing compliance with Article 2(1) is better than an approach based on the use of benchmarks. Instead, the more limited claim is that it is another type of approach which can also be used. In fact, the two types of approaches can complement each other. For example, using the approach set out by Fukuda-Parr et al (2009), a monitoring organisation might identify a country in which existing levels of ESC indicators are substantially below the levels considered achievable for that country. The organisation could then look at this country in more detail, and provide details of the additional steps the state party

could be taking to further the realisation of ESC rights, and evidence that taking any of these steps would not have sufficiently adverse consequences to justify not taking them. In this way, the approach outlined in this paper can be viewed as a more detailed stage of analysis to be carried out, after the use of benchmarks has identified potential areas of concern.[28]

It is also not claimed that the type of approach outlined in this paper is completely new. The conceptual basis was set out quite clearly, if only briefly, in Robertson (1994), and was alluded to in comments made by Eleanor Roosevelt during the drafting process of the ICESCR. In addition, the types of methods involved – in particular, human rights impact assessment and budget analysis – are already being used in the human rights field. Nevertheless, to be widely applicable, the approach does require some forms of analysis which are currently not widely used in the human rights field. These include, in particular, human rights impact assessments of the revenue raising measures a state party must adopt in order to finance the expenditure which is typically needed for the realisation of ESC rights.

Certain other caveats about the approach outlined in this paper are worth making. First, it focuses only on state compliance with Article 2(1) of the ICESCR; it does not attempt to assess compliance with other obligations contained in the ICESCR, such as those relating to non-discrimination and equality set out in Articles 2(2) and 3. Second, it focuses only on the obligations of result associated with Article 2(1), and does not attempt to assess compliance with the obligations of conduct which are associated with Article 2(1).[29] Third, it focuses only on the obligations of individual state parties; it makes no attempt to assess compliance by the international community with its obligation to provide assistance to those state parties which are constrained in their ability to fully realise ESC rights. It also makes no attempt to assess compliance by non-state actors (e.g. multinational corporations) with their

[28] This sort of broad, two-stage approach has been proposed recently by Felner (2009); the initial stage is used to "flag some possible concerns" (ibid: 415), while the subsequent more detailed stage of analysis seeks to provide more conclusive evidence of a lack of compliance, using methods that are "technically more sophisticated" (ibid: 416).

[29] That there are both obligations of conduct and obligations of result in relation to Article 2(1) of the ICESCR is made clear by Alston and Quinn (1987). According to these authors, the main obligation of conduct is that state parties "ensure a principled policy-making process – one reflecting a sense of the importance of the relevant rights" (ibid: 180-181); the main obligation of result is that state parties "match their performance with their objective capabilities" (ibid: 185). For recent suggestions as to how one might assess the obligations of conduct arising Article 2(1), see Balakrishnan and Elson (2008).

obligations to respect economic and social rights. In summary, it focuses only on one particular set of obligations associated with the international human rights framework.

A final point is that the approach to monitoring state compliance with Article 2(1) outlined in this paper can only be applied if we can provide a clear answer to the difficult normative question of what consequences are sufficiently adverse to justify not taking a step which would promote the realisation of an ESC right. However, this should be seen as an advantage rather than a disadvantage. The question cannot be avoided, and only by making it explicit can we hope to provide a satisfactory answer which commands widespread acceptance on the basis of human rights principles. Once we are able to provide a clear and satisfactory answer to this question, then the greatest challenge to monitoring compliance with Article 2(1) may well have been overcome.

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